No. 34

Supreme Court of the United States

STATE OF ALASKA
and
WALTER J. HICKEL, Governor of the State of Alaska, G. KENT EDWARDS, Attorney General of the State of Alaska, THOMAS J. MOORE, Commissioner of Labor of the State of Alaska, LEO A. PHILLIPS, ALFRED M. WHITE and WILLIAM JONES, members of International Union of Operating Engineers, Local 302,
Appellants,

vs.

INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO, INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 302, WILLIAM TYREE, CLARK WRIGHT, DONALD E. CONNER, ARLIN A. DECHANEY, and NATIONAL LABOR RELATIONS BOARD,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA,

Consolidated Cases Nos. — J-18-67 and J-19-67, Reported in 287 F.Supp. 589 (D. Alaska, 1968)

MOTIONS TO DISMISS AND/OR AFFIRM

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I

MOTION TO AFFIRM

All appellees, except the National Labor Relations

Board, move to affirm the judgment below pursuant to Rule 16 on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

II

STATEMENT IN SUPPORT OF MOTION TO AFFIRM

The Three Judge Court below stated in part:

> "Since the question is so clearly free of doubt . . . [further litigation] would have served no useful purpose." (App. to Jur. St. p. 16)

The decision below was clearly compelled by *Hill vs. Florida,* 325 US 538; *Plumbers' Union vs. Borden,* 373 US 690; and *Local 24, International Bro. of Teamsters vs. Oliver,* 358 US 283.

Other cases cited by the Court below or herein lend interpretive value to the decisions in those three cases, or substantiate their continuing vitality, but those three cases appear conclusive of the issues involved in this case.

For brevity, the International Union of Operating Engineers will hereinafter be referred to as the International, whereas, the International Union of Operating Engineers, Local 302 will be referred to as Local 302.

Local 302, whose main office is in Seattle, Washington maintains offices in Juneau, Anchorage and Fairbanks in Alaska and Wenatchee, Yakima and Mt. Vernon in Washington. In other areas it works through the nearest Building Trades Council (Doc. No. 7. Vol. I).

Prior to 1967, Local 302 had, pursuant to elections duly held, been certified by the National Labor Relations Board as the collective bargaining representative for employees of more than sixty employers doing business in the State of Alaska, including, as one employer, the Alaska Chapter of the Associated General Contractors of America which was comprised of different individual contractors who, at that time, numbered in excess of forty members (Doc. No. 7, Vol. I).

In 1967 the legislature of the State of Alaska enacted a law, set forth as Appendix "D" of the Jurisdictional Statement, which made it a crime, with a fine of not less than $1000 nor more than $10,000 for a ". . . national or international labor organization having 100 or more members in good standing who *reside or work* in Alaska . . ." not to have duly chartered locals in the state. (Emphasis supplied)

The International admittedly did not have any separately chartered locals in Alaska.

At this point, of course, Local 302 could not continue to carry out its duties as certified collective bargaining agent as those duties are described and defined by the Labor-Management Relations Act of 1947, as amended, (29 USC 151 ff) without subjecting its International to criminal prosecution.

There is nothing in the Labor- Management Relations Act of 1947, as amended, (29 USC 151 ff) which would have prevented any group of Alaskans from forming their own union and having participated in the sixty some elections which were held upon the petitions of Local 302. Nor is there anything in the

Act that would even now prevent the filing of petitions by such groups at appropriate times.

Subsection (4) of Section (2) of the Act (29 USC sec. 152) reads as follows:

> "The term 'representatives' includes any individual or labor organization."

Subsection (5) of the same section reads as follows:

> "The term 'labor organization' means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours employment or conditions of work."

Section (9) (a) of the Act (29 USC sec. 159) reads in part as follows:

> "Representatives designated or *selected* for the purposes of collective bargaining *by the majority of the employees* in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining . . . " (Emphasis supplied)

The effect and meaning of the 1967 Statute of Alaska was that the employees of an appropriate unit could not exercise the rights guaranteed under Section 9 to select a collective bargaining representative, as that term is defined in the above quoted sections, if that representative happened to be affiliated with an international union which did not have a chartered local in the state without the threat of criminal sanctions being imposed.

The State filed several criminal actions against the International, Local 302 and its representatives and agents (Exs E & F to Doc. No. 1, Vol. I). Also a civil action was commenced by the State in the Superior Court for the State of Alaska bottomed on the statute seeking various forms of injunctive relief (Ex G to Doc. No. 1, Vol. I).

Certain regulations having been promugulated by the State to implement the statute in the meantime (Ex A to Doc. No. 1, Vol. I & Ex D to Doc. No. 1, Vol. III) the Associated General Contractors of Alaska, with whom Local 302 had a contract, served notice that they declined to comply with the contract until determination of the question of the validity of the Alaska statute (Ex E to Doc. 1, Vol. III).

These two actions were commenced, one J-18-67, being brought in the name of several individual members of Local 302 and Local 302 itself. The International intervened as a party plaintiff in that action (Doc. No. 41, Vol. I). This action was instituted against the various officials of the State of Alaska charged with the enforcement of the statute and sought to declare the statute unconstitutional and enjoin enforcement.

The second action, J-19-67, was brought by Local 302 against the Alaska Chapter of Associated General Contractors of America, Inc. seeking specific performance of its contract (Doc. No. 1, Vol. III). The State of Alaska intervened in that case as a defendant because the issues framed in that case likewise centered around the constitutionality of the Alaska statute. Local 302 then likewise prayed for relief against the Intervenor State of Alaska (Doc. No. 15,

Vol. III).

Plaintiffs asserted several grounds of unconstitutionality which are set forth in the opinion of the Court below (See page 9, app. Jur. St.)

The following language from this Court's decision in *Hill vs. Florida,* 325 US 538, effectively demonstrates the invalidity of the Alaska statute:

> "[1] It is apparent that the Florida statute has been so construed and applied that the union and its selected representative are prohibited from functioning as collective bargaining agents, or in any other capacity, except upon conditions fixed by Florida. The declared purpose of the Wagner Act, as shown in its first section, is to encourage collective bargaining, and to protect the "full freedom" of workers in the selection of bargaining representatives of their own choice. To this end Congress made it illegal for an employer to interfere with, restrain or coerce employees in selecting their representatives. *Congress attached no conditions whatsoever to their freedom of choice in this respect. Their own best judgment, not that of someone else, was to be their guide. 'Full freedom' to choose an agent means freedom to pass upon that agent's qualifications.* (emphasis supplied)
>
> "Section 4 of the Florida act circumscribes the 'full freedom' of choice which Congress said employees should possess. It does this by requiring a 'business agent' to prove to the satisfaction of a Florida Board that he measures up to standards set by the State of Florida as one who, among other things, performs the exact function of a collective bargaining representative. To the extent that Section 4 limits a union's choice of such an 'agent' or bargaining representative, it substitutes Florida's judgment for

the workers' judgment.

"Thus, the 'full freedom' of employees in collective bargaining which Congress envisioned as essential to protect the free flow of commerce among the states would be, by the Florida statute, shrunk to a greatly limited freedom. No elaboration seems required to demonstrate that Section 4 as applied here "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Hines v. Davidowitz, 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581; Cloverleaf Butter Co. v. Patterson, 315 U.S. 148 62 S.Ct. 491, 86 L.Ed. 754; Napier v. Atlantic, Coast Line R. Co., 272 U.S. 605, 47 S.Ct. 207, 71 L.Ed. 432. It is not amiss, however, to call attention to the fact that operation of this very section has already interfered with the collective bargaining process. An employer before the Labor Board defended its refusal to bargain with a duly selected representative of workers on the ground that the representative had not secured a Florida license as a business agent. In the Matter of Eppinger & Russell Co., et al., 56 N.L.R.B. 1259. The Board properly rejected the employer's contention, holding that Congress did not intend to subject the 'full freedom' of employees to the eroding process of 'varied and perhaps conflicting provisions of state enactments.' Cf. N.L.R.B. v. Hearst Publications, Inc., 322 U.S. 111, 64 S.Ct. 851, 88 L.Ed. 1170.

"Since the Labor Board has held that an employer must bargain with properly selected union agent despite his failure to secure a Florida license, it is argued that the state law does not interfere with the collective bargaining process. But, here, this agent has been enjoined, and if the Florida law is valid he could be found guilty of a contempt for doing that which the act of Congress permits him to do. Furthermore, he

could, under Section 14 of the state law, be convicted of a misdemeanor and subjected to fine, and imprisonment. The collective bargaining which Congress has authorized contemplates two parties free to bargain, and cannot thus be frustrated by state legislation. We hold that Section 4 of the Florida Act is repugnant to the National Labor Relations Act.

"Section 6, as here applied, stands no better. The requirement as to the filing of information and the payment of a $1.00 annual fee does not, in and of itself, conflict with the Federal Act. But for failure to comply, this union has been enjoined from functioning as a labor union. It could not without violating the injunction and also subjecting itself to the possibility of criminal punishment even attempt to bargain to settle a controversy or a strike. It is the sanction here imposed, and not the duty to report, which brings about a situation inconsistent with the federally protected process of collective bargaining. Cf. Western Union Telegraph Co. v. Commonwealth of Massachusetts, 125 U.S. 530, 553, 554, 8 S. Ct. 961, 965 966, e L.Ed. 790; Kansas City Southern R. Co. v. Kaw Valley Drainage District, 233 U.S. 75, 78, 34 S. Ct. 564, 565, 58 L. Ed. 857, St. Louis Southwestern Ry. v. State of Arkansas, 235 U.S. 350, 368, 35 S. Ct. 99, 204, 599 L. Ed. 265. This is true because if the union or its representatives acted as bargaining agents without making the required reports, presumably they would be liable both to punishment for contempt of court and to conviction under the misdeameanor section of the act. Such an obstacle to collective bargaining cannot be created consistently with the Federal Act."

As stated by the Court below any doubt as to the continuing vitality of the decision of *Hill vs. Florida,* 325 US 538 was dispelled by its recent approval in

the case of *Nash vs. Florida Industrial Insurance Commission,* 389 US 235.

Alaska relies in large measure on *DeVeau vs. Braisted,* 363 US 144. Appellant states (Jur. St. p. 19): "There is no *requirement* of Congressional approval in *DeVeau* or in any other case . . . ." In *DeVeau,* this court distinguishing *Hill* specifically said: "An element *most persuasive here, Congressional approval* of the heart of the State legislative program explicitly brought to its attention, was not present in that [Hill] case." (emphasis supplied)

This Court also noted in *DeVeau* ". . . that the challenged State legislation was part of a program, *fully canvassed by Congress through its own investigations, . . .*" (Emphasis supplied). These quotations from *DeVeau* were cited and analyzed by the Three Judge Court below. The Court concluded that these distinctions made the doctrine of *Hill* rather than that of *DeVeau* applicable to the present case.

The 1968 amendments adopted by the legislature of Alaska, which are contained in Appendix "E" of the Jurisdictional Statement, added to the penalties; specifically provided for civil enforcement by injunctive relief and added a new crime for "interference in chartering". Since the Court below invalidated the Act of 1967 (which would carry with it invalidation of the 1968 amendments), it seems unnecessary to advert further to the amendments of 1968 except to point out that the type of burdens and strictures, common to those stricken down in *Hill vs. Florida,* supra, were increased.

By like token, since the decision of the Court below

struck down the laws of 1967, we do not here more than mention the fact that the 1968 amendments permitted exemptions from criminal prosecution to unions which included "local hire preference provisions" in all of their agreements. Similar exemption is denied to other unions who would equally be guilty of violation of the criminal provision but whose contracts were different. The 1968 amendments clarify the clash with the doctrine of *Local 24 of IBT vs. Oliver,* 358 US 283 and the conflict with the equal protection clause. *Mullaney vs. Anderson,* 342 US 415; *Brown vs. Anderson,* 202 F. Supp. 96 (Involving Alaska resident preference statutes or regulations).

This brings us to the state court civil injunction proceedings initiated by the State. Prior to the hearing by the Three Judge Court, a preliminary injunction was granted in this state court proceeding which pertained solely to the operation of Local 302's hiring hall and it's procedures. Although the complaint in that case (p. 19 of Jur. St.) alleged violation of the so called "Local Autonomy Act", and although counsel now chooses to designate it as a "public nuisance" action, the preliminary injunction is defended upon the ground that it is warranted by this Court's ruling in *Vaca vs. Sipes,* 386 US 171. The Three Judge Court below held that, instead, the action and the preliminary injunction granted by the Superior Court were invalidated under the ruling of this Court in *Plumbers' Union vs. Borden,* 373 US 690.

Vaca dealth with individual rights in the processing of grievances or enforcement of individual rights. *Borden* on the other hand, dealth with alleged discriminatory practices in the operation of a hiring hall. We quote from *Borden:*

> *"The problems inherent in the operation of union hiring halls are difficult and complex,* see Rothman, The Development and Current Status of the Law Pertaining to Hiring Hall Arrangements, 48 Va L Rev 871, *and point up the importance of limiting initial competence to adjudicate such matters to a single expert federal agency."* (Emphasis supplied) 373 US 696, 697

The case of *Ironworkers' Union vs. Perko,* 373 US 701, heard and decided at the same time as the *Borden* case, lends further support to the position that the *Borden* doctrine is applicable to the case at bar.

The court below placed its reliance upon *Borden* and the fact that hiring hall discrimination was there claimed as it was in the Superior Court action here.

However, in distinguishing *Vaca,* we cannot help but note another matter.

Certainly this Court in *Vaca vs. Sipes,* 386 US 171, was not intending to re-invalidate broad scale use of the discredited labor injunction. No injunction was involved there. *Vaca* dealt with an individual problem and its resolution. The injunction here applied to the entire operation of the union's hiring hall and purported to freeze it into operating under its contract provisions.

Such "freezing" is entirely inconsistent with the doctrine that collective bargaining is a continuing process, *United Steelworkers vs. Warrior & G. Nav. Co.,* 363 US 574 and the duty of the respective parties to apply, interpret, amend or even supplement a contract where necessary or desirable, *Humphrey vs. Moore,* 375 US 335, and *Ford Motor Company vs. Huffman,* 345 US 330.

Neither did *Vaca vs. Sipes* authorize the intrusion of a *state,* as distinguished from individuals or groups of employees themselves, into the collective bargaining process.

Official state intrusion into the free collective bargaining process interferes with the bargaining parties' federal rights. *Local 24 of I.B.T. vs. Oliver,* 358 US 283; *General Electric Company vs. Callahan,* (CA5 1961) 294 F.2d 60, Cert Dism 369 US 832; and *Pan Am Airways vs. California Division Labor Law,* 203 F Supp 324.

Vaca does not hold otherwise.

Therefore, it is clear that *Plumbers Union vs. Borden,* 373 US 690, is controlling here as to state court jurisdiction and *Vaca vs. Sipes,* 386 US 171 is not apposite.

III

MOTION TO DISMISS AS TO APPELLANTS LEO A. PHILLIPS, ALFRED M. WHITE AND WILLIAM JONES

All appellees, except the National Labor Relations Board, move the Court to dismiss the appeals of Leo A. Phillips, Alfred M. White and William Jones for the reason that they were not parties below.

IV

STATEMENT IN SUPPORT OF MOTION TO DISMISS AS TO APPELLANTS LEO A. PHILLIPS, ALFRED M. WHITE AND WILLIAM JONES

On May 3, 1968, Leo A. Phillips, Alfred M. White

and William Jones moved to intervene in Cause No. J-18-67 (Doc. No. 44, Vol. II). They appeared through their counsel, Savage, Erwin, and Curran (Doc. No. 46, Vol. II). Exhibits, including affidavits to which were attached numerous unsworn and unsigned documents, petitions, etc. were filed in support of the Motion to Intervene (Doc. No. 44, Vol. II). On May 22, 1968, an order was entered denying the motion of Phillips, White and Jones to intervene (Doc. No. 57, Vol. II).

No appeal was taken from that order.

Thereafter those proposed intervenors played no additional part in the case. They were, for example, not parties to the stipulations of facts upon which the cases were tried (Doc. No. 67 & 68, Vol. II). Neither were they mentioned in the Court's opinion below (Doc. No. 70, Vol. II) nor in the judgments entered (Doc. No. 74, Vol. II). (There were two judgments entered in the two consolidated cases although only one, and that an incorrect copy, is included in the appendix to the Jurisdictional Statement.)

When counsel for the State of Alaska filed his amended notice of appeal on August 26, 1968 (Doc. No. 75, Vol. II), he included the proposed intervenors, although he had not purported to represent them before.

If the proposed intervention was of right or the denial was an abuse of discretion, the order denying intervention was an appealable order. *Brotherhood of Railroad Trainmen vs. Baltimore & O. R. Co.,* 331 US 519; *Missouri-Kansas Pipeline Co. vs. United States of America,* 312 US 502; *Textile Workers'*

Union of America vs. Allendale Co., (CADC 1955) 226 F.2d 765; *Nuesse vs. Camp*, (CADC 1967) 385 F.2d 694.

On the other hand, as pointed out by this Court in *Brotherhood of Railroad Trainmen vs. Baltimore & O. R. Co.*, 331 US 519 at 524, if denial was within discretion and was not appealable, and ergo, not reviewable here, it would be because there was some other remedy available to the proposed intervenors and their rights to proceed otherwise have not been impaired.

The practical effect in this case is that the appellants seek to bring before this Court the unsworn statements, unsigned petitions and other improper documentary material which were attached to affidavits in support of the motion to intervene, which were never moved against nor answered by the appellees and were never before the Three Judge Court, because of the order denying the intervention. The stipulation of facts, upon which the case J-18-67 was tried, signed by all parties, but not by the proposed intervenors, (Doc. No. 67, Vol. II) contained a provision that the affidavits submitted by "parties" could be considered by the Three Judge Court. Appellants, by seeking to make these proposed intervenors parties to this proceeding in the Supreme Court, are apparently attempting, ex post facto, to now make them "parties" under the stipulation and hence, get before this Court the documents referred to above.

Therefore, it is respectively submitted that since the proposed intervenors, Philips, White and Jones, were not parties to the proceedings below and did not appeal from the order denying intervention, their appeal should be dismissed.

CONCLUSION

It is respectfully submitted that there is no substantial question but that the Alaska Statute is unconstitutional under *Hill vs. Florida,* 325 US 538 and *Local 24 IBT vs. Oliver,* 358 US 283, and that the Alaska state court lacked jurisdiction of the civil injunction suit under *Plumbers' Union vs. Borden,* 373 US 690 and that therefore, plenary consideration and oral argument are not necessary and the judgment below should be affirmed. Further, the attempted appeals of the rejected intervenors, Philips, White and Jones, should be dismissed.

Respectfully submitted,

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